Supreme Court, U.S.
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No. 92-1481

In The

Supreme Court of the United States

October Term, 1992

KONRAD RADASZEWSKI, by
CECILIA RADASZEWSKI, His Guardian,

Petitioner,

v.

TELECOM CORPORATION,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals properly grant Telecom's motion to dismiss for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted in light of petitioner's failure to produce evidence that Contrux was operated with an improper purpose as to petitioner?

2. Did the court of appeals follow Missouri common law and policy when it held that Contrux was not operated with an improper purpose to evade petitioner's personal injury claim because Contrux purchased substantially more insurance than required under federal financial responsibility regulations governing the trucking industry?

LIST OF PARTIES

Petitioner Konrad Radaszewski

Respondent Telecom Corporation[1]

Contrux, Inc.

Dan Leslie Satterfield

Flexi-Van, Inc.

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[1] The following corporations are subsidiaries of Telecom: Meyer Machine Company, A.L. Investors, Inc., Corporate Realty Services, Inc., Corporate Realty Services of Ohio, Inc., TeleCom Industrial Group, Inc., K-A Enterprises, Inc., Contrux, Inc., MRA Asset Holding Co., Flower Mound Holding Co., Inc., Sachse 5 and 33, Inc., Comfort Supply, Inc., TeleCom Real Estate Group, Inc., TeleCom Properties, Inc., Texas Capital Corporation, Meyer Tempco, Inc., A.L. Brewer Corporation, Southwest Dallas 10, Inc., Meyer Europe Limited, Meyer Vi-Tech Limited.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

STATUTES AND RULES INVOLVED 1

STATEMENT OF THE CASE 1

1. Factual Background 1

2. Proceedings in the Lower Courts 4

REASONS FOR DENYING THE WRIT 5

I. THE COURT OF APPEALS PROPERLY APPLIED DUE PROCESS PRINCIPLES AND MISSOURI LAW WHEN IT DISMISSED PETITIONER'S AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION 6

A. Petitioner Cannot Establish That Telecom Falls Within The Reach Of The Missouri Long-Arm Statute Unless He Proves Contrux Is Telecom's Alter Ego 6

B. The Court Of Appeals Dismissed Petitioner's Amended Complaint Because He Failed To Present Evidence To Support The Improper Purpose Element Of His Action To Pierce The Corporate Veil 7

1. Under Missouri Law, Petitioner Must Prove An Improper Purpose, Not Mere Undercapitalization 8

2. As A Matter Of Law, Contrux Was Not Operated With An Improper Purpose ... 12

TABLE OF CONTENTS – Continued

Page

C. Personal Jurisdiction Over Telecom Is Inconsistent With Fundamental Principles Of Due Process..... 16

D. The Court Of Appeals' Dismissal Of Petitioner's Complaint Against Telecom Is Consistent With Public Policy As Established By Missouri Courts..... 18

II. THE COURT OF APPEALS PROPERLY GRANTED TELECOM'S MOTION TO DISMISS PETITIONER'S AMENDED COMPLAINT PURSUANT TO RULES 12(b)(2) AND 12(b)(6)..... 19

A. The United States Supreme Court Should Not Grant The Petition For Writ Of Certiorari Because Petitioner Did Not Oppose The Burden Of Proof Adopted By The Lower Courts..... 19

B. Petitioner Failed To Present Any Evidence That Contrux Was Operated With An Improper Purpose As To Petitioner..... 20

C. The District Court And The Court Of Appeals Adopted The Prima Facie Evidence Standard Urged By Petitioner..... 23

D. The Eighth Circuit Is Not In Conflict With Other Circuit Courts Regarding The Appropriate Standard To Apply On Rule 12(b)(2) And Rule 12(b)(6) Motions To Dismiss.... 26

E. The Court Of Appeals Did Not Improperly Transform Telecom's Motion To Dismiss Into A Summary Judgment Motion..... 27

F. The Court of Appeals and the District Court Did Not Violate Petitioner's Due Process Rights When They Dismissed His Complaint..... 28

TABLE OF CONTENTS – Continued

Page

G. Petitioner Was Aware Of The Evidentiary Nature Of The Proceedings On Telecom's Motion To Dismiss 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

A.L. Lab., Inc. v. Philips Roxane, Inc., 803 F.2d 378 (8th Cir. 1986), *cert. denied*, 481 U.S. 1007 (1987) . . 7, 11

Aaron Ferer & Sons Co. v. Diversified Metals Corp., 564 F.2d 1211 (8th Cir. 1977) 25, 26

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 27

Atlas Construction Co. v. Slater, 746 P.2d 352 (Wyo. 1987) 16

Bialek v. Racal-Milgo, Inc., 545 F. Supp. 25 (S.D.N.Y. 1982) 26

Block Industries v. D.H.J. Industries, Inc., 495 F.2d 256 (8th Cir. 1974) 24

Collet v. American National Stores, Inc., 708 S.W.2d 273 (Mo. App. 1986) . . . . . *passim*

Crimm v. Mo. Pac. R.R. Co., 750 F.2d 703 (8th Cir. 1984) 13

Dakota Industries v. Dakota Sportswear, 946 F.2d 1384 (8th Cir. 1991) 24, 25, 26

Data Disc, Inc. v. Systems Technology Assoc., Inc., 557 F.2d 1280 (9th Cir. 1977) 26

C.C. Dillon Co. v. Robinson, 636 S.W.2d 380 (Mo. App. 1982) 10

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 6, 11

Grote Meat Co. v. Goldenberg, 735 S.W.2d 379 (Mo. App. 1987) 10

TABLE OF AUTHORITIES – Continued

Page

H.H. Robertson Co. v. V.S. DiCarlo Gen. Contr., Inc., 789 F. Supp. 998 (E.D. Mo. 1992) 10

Hanline v. Sinclair Global Brokerage Corp., 652 F. Supp. 1457 (W.D. Mo. 1987) 24

Hanson v. Denckla, 357 U.S. 235 (1958) 16

Institutional Food Mktg. Assoc. v. Golden State Strawberries, Inc., 747 F.2d 448 (8th Cir. 1984) 24

International Shoe Co. v. Washington, 326 U.S. 310 (1944) 16, 17

Lawton-Byrne-Bruner Ins. Agency Co. v. Stiers Bros. Const. Co., 186 S.W.2d 480 (Mo. App. 1945), *rev'd on other grounds*, 190 S.W.2d 880 (Mo. 1945) 9

Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2nd Cir. 1981) 26

May Dept. Stores v. Union Elec. Light & Power Co., 107 S.W.2d 41 (Mo. 1937) 9

Northern Heel Corp. v. Compo Industries, Inc., 851 F.2d 456 (1st Cir. 1988) 13

Omaha Indemnity Co. v. Royal American Managers, Inc., 755 F. Supp. 1451 (W.D. Mo. 1991) 10

Publications Group, Inc. v. Am. Soc. of Heating, Refrig. and Air Conditioning Engineers, Inc., 566 F. Supp. 316 (D. Conn. 1983) 25

Ring v. First Interstate Mortg., Inc., 984 F.2d 924 (8th Cir. 1993) 25

Sea-Land Services, Inc. v. Pepper Source, 941 F.2d 519 (7th Cir. 1991) 12

TABLE OF AUTHORITIES – Continued

Page

Thompson v. Ecological Science Corp., 295 F. Supp. 1307 (E.D. Ark. 1969), *rev'd on other grounds*, 421 F.2d 467 (8th Cir. 1970) 24

Timeshare Vacation Club v. Atlantic Resorts, Limited, 735 F.2d 61 (3rd Cir. 1984) 24

Watlow Elec. Mfg. v. Patch Rubber Co., 838 F.2d 999 (8th Cir. 1988) 25

Welsh v. Gibbs, 631 F.2d 436 (6th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981) 25

Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 17

STATUTES AND REGULATIONS

28 U.S.C. § 1292(b) 4

44 U.S.C. § 1507 13

49 C.F.R. § 387.1 ..... 1, 13

49 C.F.R. § 387.3 1

49 C.F.R. § 387.5 ..... 1, 21, 22

49 C.F.R. § 387.7 ..... 1, 21

49 C.F.R. § 387.9 ..... 1, 2, 13, 15, 21

49 U.S.C. § 10101 ..... 1, 2, 12, 13, 14

Fed. R. Civ. P. 12(b)(2) ..... *passim*

Fed. R. Civ. P. 12(b)(6) ..... *passim*

Fed. R. Civ. P. 56 ..... 1, 7

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Evid. 201 13

Mo. Ann. Stat. § 506.500 ..... 1, 6, 7

OTHER AUTHORITIES

5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1351 (1990) 24

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Telecom Corporation respectfully requests the Court to deny the Petition of Konrad Radaszewski for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

STATUTES AND RULES INVOLVED

This case involves the application of the Missouri Long-Arm Statute, Mo. Ann. Stat. § 506.500; Federal Rules of Civil Procedure 12(b)(2), 12(b)(6) and 56; and federal statutes and regulations governing financial responsibility for motor carriers, 49 U.S.C. § 10101 and 49 C.F.R. §§ 387.1, 387.3, 387.5, 387.7 and 387.9.

STATEMENT OF THE CASE

1. Factual Background

Telecom Corporation is a Texas corporation that does not transact business in the State of Missouri. Petitioner Konrad Radaszewski filed suit against Telecom in the United States District Court for the Western District of Missouri alleging that Telecom is liable for his injuries, which allegedly were caused by the negligence of Dan Leslie Satterfield. Satterfield never worked for or with Telecom, nor has he had any relationship with the company. Satterfield worked as a truck driver for Contrux, a Telecom subsidiary that had its principal place of business in Illinois.

The essence of petitioner's claim is that Contrux is the mere instrumentality and alter ego of Telecom, and that the alleged respondeat superior liability of Contrux for any negligence of Satterfield should be imputed to Telecom. Petitioner filed suit against Telecom after he discovered that Contrux's excess liability insurance carrier, Integrity Insurance Company, was in receivership.

Contrux has a $1 million primary liability insurance policy with the Insurance Company of Pennsylvania and a $10 million excess liability insurance policy with Integrity.

To impute Contrux's alleged respondeat superior liability to Telecom and to establish personal jurisdiction over Telecom, petitioner must prove the elements of an action to pierce Contrux's corporate veil. Under Missouri law, petitioner must prove Telecom (1) controlled Contrux (2) for an improper purpose (3) that proximately caused an injury to him. *Collet v. American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986). To that end, petitioner pleaded that Telecom controlled Contrux, that Contrux was undercapitalized, that Telecom formed Contrux for the sole purpose of establishing a non-union subsidiary to take business from Specter Red Ball, a Telecom subsidiary that suffered from labor difficulties, and that these factors caused an unspecified injury to him. Petitioner, however, has not offered any evidence that Telecom actually had an improper purpose as to him. Telecom thus moved to dismiss petitioner's complaint for failure to state a claim upon which relief can be granted and for lack of personal jurisdiction.

Contrux was formed in 1980, and was engaged in interstate trucking between 1981 and 1985. Caught in the destructive competition that arose from the deregulation of the trucking industry in the 1980's, Contrux was unable to operate profitably despite Telecom's constant infusion of capital. During Contrux's five years of operations, Telecom contributed more than $750,000 in loans and capital to Contrux to enable it to operate. When Contrux ceased operations in 1985, Telecom did not recover its investment.[1]

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[1] Although for purposes of Telecom's Rule 12(b)(2) and 12(b)(6) motion to dismiss Telecom does not challenge peti-

Contrux financially prepared itself for potential tort liability by substantially exceeding the federal financial responsibility regulations for motor carriers. Contrux obtained a $1,000,000 primary liability insurance policy that fully satisfied the regulations. In addition, Contrux chose to provide additional protection for potential tort claimants such as petitioner by purchasing a $10 million excess liability policy from Integrity Insurance Company. The regulations, designed to protect individuals such as petitioner, require all motor carriers to obtain liability insurance of $500,000 to $1,000,000, or obtain permission to self-insure. 49 U.S.C. § 10101(a); 49 C.F.R. § 387.9. There is no dispute that Contrux's coverage has already benefitted petitioner, who has obtained nearly $1 million from Contrux's primary insurance carrier in partial settlement of his claims.

On August 21, 1984, petitioner claims he was injured when an eighteen wheel tractor-trailer unit driven by Satterfield collided with him. Petitioner originally filed suit against only Satterfield, Contrux and Flexi-Van Leasing, Inc. (a former party) in Illinois. The Illinois court dismissed the action on forum non conveniens grounds.

On March 24, 1987, Contrux's excess liability insurance carrier, Integrity, was placed in receivership. After Integrity went into receivership, petitioner filed suit in Missouri against Telecom and the other defendants. It is not known whether the Integrity receivership will affect petitioner's ability to collect a judgment against Contrux if he obtains one. It undoubtedly is this uncertainty, however, that has led petitioner to attempt to pierce the corporate veil of Contrux to reach Telecom's assets.

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tioner's allegation that Contrux was undercapitalized, it is important to note there is no evidence that Telecom stripped Contrux of assets or intended for Contrux to evade tort claims. To the contrary, the evidence is that Telecom poured money into Contrux, but ultimately did not see a return on its investment.

2. Proceedings in the Lower Courts

Petitioner filed his complaint against Contrux, Flexi-Van and Telecom in the district court. Petitioner's sole basis for filing suit against Telecom and for establishing personal jurisdiction over Telecom in the State of Missouri was his claim that Telecom was the alter ego of Contrux.

Telecom moved to dismiss petitioner's claims against Telecom for lack of personal jurisdiction and for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(2), (6). After extensive briefing, the district court dismissed Telecom on both grounds, and designated the order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Petitioner appealed. In its December 13, 1989 opinion, the United States Court of Appeals for the Eighth Circuit reversed and remanded the case for sixty days to allow petitioner an opportunity to discover facts that might support his claim that Telecom was the alter ego of Contrux. Petitioner conducted extensive document and deposition discovery.

After this discovery period, petitioner filed an amended complaint. As in his first complaint, petitioner alleged Telecom's sole purpose for creating Contrux was to establish a non-union common carrier to compete with Specter Red Ball.

Telecom moved to dismiss the amended complaint for lack of personal jurisdiction and for failure to state a claim upon which relief could be granted. The district court dismissed petitioner's amended claims against Telecom for want of jurisdiction, but did so without prejudice, holding that petitioner's amended claims against Telecom were premature because he has not yet suffered an injury resulting from Contrux's alleged inability to satisfy a judgment. The district court designated its order immediately appealable pursuant to 28 U.S.C. § 1292(b).

In its November 12, 1992 opinion, the court of appeals affirmed the district court's dismissal of Telecom, but reversed the portion of the district court's order designating the dismissal "without prejudice". The court of appeals concluded petitioner had failed to present any evidence to support the improper purpose element of his cause of action.

REASONS FOR DENYING THE WRIT

This is a case in which the court of appeals properly granted Telecom's motion to dismiss because petitioner failed to present any evidence supporting a necessary element of his claim.

Petitioner principally claims, without merit, that the court of appeals' decision is in conflict with other circuits' standards for ruling on motions to dismiss. An examination of the opinion below demonstrates that in evaluating Telecom's motion to dismiss, the court of appeals properly adopted the prima facie evidence standard used in other circuits. Moreover, this case does not actually involve any meaningful issue as to burden of proof because petitioner failed to present *any* evidence to support the improper purpose element of his cause of action.

Neither has petitioner suffered a Seventh Amendment deprivation. There is no issue for a jury in this case. The decisions by the lower courts are consistent.

The court of appeals' analysis of petitioner's alter ego cause of action was based on the common law of the State of Missouri as set forth in *Collet v. American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986). To pierce Contrux's corporate veil, petitioner must establish that Telecom controlled Contrux, that Telecom exercised that control for an improper purpose, and that Telecom's control of Contrux and its improper purpose proximately caused an injury to him. *Collet*, 708 S.W.2d at 284. Petitioner failed to present any material evidence of an

improper purpose. Rather, petitioner relied solely on evidence of Contrux's undercapitalization in an accounting sense. The only viable evidence on the critical issue of Telecom's purpose as to Contrux's responsibility to potential tort claimants was that Contrux purchased substantially more liability insurance than required by federal financial responsibility regulations.

Petitioner's contention that the court of appeals should have applied a purely objective test of capitalization to determine if Contrux was operated with an improper purpose is inconsistent with Missouri law, which requires that the improper purpose element be evaluated in relation to the type of claimant. Consequently, his position is fundamentally at odds with the principal of federalism this Court established in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Because it is essential to understand the state law principles that guided the court of appeals in ruling on Telecom's motion to dismiss, the discussion of state law precedes the analysis of the court of appeals' application of federal law and procedure to the facts of this case.

I. THE COURT OF APPEALS PROPERLY APPLIED DUE PROCESS PRINCIPLES AND MISSOURI LAW WHEN IT DISMISSED PETITIONER'S AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION.

A. Petitioner Cannot Establish That Telecom Falls Within The Reach Of The Missouri Long-Arm Statute Unless He Proves Contrux Is Telecom's Alter Ego.

In order to establish personal jurisdiction over Telecom, petitioner first must establish that Telecom falls within the reach of Missouri's Long-Arm Statute. Mo. Ann. Stat. § 506.500 (Vernon Supp. 1988). Petitioner's

only purported basis for personal jurisdiction over Telecom is his claim that Telecom is the alter ego of Contrux, a company whose employee allegedly committed a tort in Missouri. Petitioner does not contend Telecom committed a tort or transacts business in the state of Missouri. Petitioner relies upon the single-act tort section of the Missouri Long-Arm Statute which creates jurisdiction over out-of-state corporations that commit a tort within the state. Mo. Ann. Stat. § 506.500.3 (Vernon Supp. 1988); Appendix A.

Petitioner has the burden of proving that the district court has personal jurisdiction over Telecom pursuant to the Missouri Long-Arm Statute and that personal jurisdiction is consistent with constitutional due process principles; he cannot shift that burden to Telecom. Fed. R. Civ. P. 12(b)(2); *see infra* pp. 16, 17, 24. To do so, petitioner must prove Contrux is Telecom's alter ego. Petitioner failed to offer any evidence supporting the improper purpose element of his cause of action.

B. The Court Of Appeals Dismissed Petitioner's Amended Complaint Because He Failed To Present Evidence To Support The Improper Purpose Element Of His Action To Pierce The Corporate Veil.

In order to pierce Contrux's corporate veil, petitioner must plead and prove (1) that Telecom controlled Contrux with respect to the transaction attacked, (2) that Telecom controlled and dominated Contrux with an improper purpose, to justify wrong, to defeat public convenience, or to perpetrate fraud, and (3) that the above mentioned control and improper purpose were the proximate cause of petitioner's injury. *A.L. Lab., Inc. v. Philips Roxane, Inc.*, 803 F.2d 378, 385 (8th Cir. 1986), *cert. denied*, 481 U.S. 1007 (1987); *Collet v. American National Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. App. 1986).

The Petition for Writ of Certiorari focuses primarily on the improper purpose element of petitioner's purported cause of action. The courts below both presumed for purposes of the motion to dismiss that petitioner had established prima facie evidence that Telecom controlled Contrux and that Contrux was undercapitalized. Petitioner's Appendix, pp. 5A, 20A. The court of appeals did not determine whether plaintiff satisfied the proximate cause element of his cause of action.

The court of appeals dismissed petitioner's amended complaint because he failed to demonstrate Contrux was operated with an improper purpose as to him. Each element of petitioner's cause of action – control, improper purpose, and proximate cause – must relate to the other if petitioner is to demonstrate that Contrux is the alter ego of Telecom. *Collet*, 708 S.W.2d at 284. Petitioner has failed to present any evidence that Telecom exercised control over Contrux to further an improper purpose that caused his injury.

1. Under Missouri Law, Petitioner Must Prove An Improper Purpose, Not Mere Undercapitalization.

Consistently, Missouri courts have held that to pierce the veil of a subsidiary corporation, more than mere insolvency is required. To establish his cause of action, petitioner must prove that Telecom controlled and operated Contrux "with an improper purpose, to justify wrong, to defeat public convenience, or to perpetrate fraud." *Collet*, 708 S.W.2d at 273. Missouri courts will not disregard the corporate form unless equity demands it. The *Collet* court held:

> Ordinarily, the separate legal identities of two corporations will be protected. This is true even where one corporation owns a part or all of the other. However, instances do occur when one corporation shows such domination and control

> over another that the latter corporation becomes a mere adjunct or "alter ego" of the first. In such a situation, *when the formal corporate separateness in the arrangements between the two corporations is devised or used to accomplish a fraud, injustice, or some unlawful purpose, then the separate formal corporate structures will be ignored.*

(Emphasis added). *Collet*, 708 S.W.2d at 283-4 (citing *Camelot Carpets v. Metro Distributing Co.*, 607 S.W.2d 746, 749 (Mo. App. 1980)).

The corporate form will be disregarded only when the control exercised by the parent corporation was used improperly. For example:

> [i]f the corporate affiliation is devised or being used to perpetrate fraud or injustice or accomplish some unlawful purpose, equity will interpose to tear down technical legal barriers and pierce through the corporate veil.

Lawton-Byrne-Bruner Ins. Agency Co. v. Stiers Bros. Const. Co., 186 S.W.2d 480, 484 (Mo. App. 1945), *rev'd on other grounds*, 190 S.W.2d 880 (Mo. 1945). Missouri courts will pierce the veil of a corporation that intentionally "operated without sufficient funds to meet obligations to those who must deal with it." *May Dept. Stores v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 55 (Mo. 1937).

In *Collet*, the parent corporation had its subsidiary enter a 25-year lease when the parent knew the subsidiary was insolvent. *Collet*, 708 S.W.2d at 287. The *Collet* court found an improper purpose because the subsidiary's undercapitalization was "beyond cavil" and "far below industry standards," and "this was the culmination of a course of conduct which made it impossible for [the corporate subsidiary] to operate and satisfy its obligations, and justifies piercing the corporate veil." *Id.* Additionally, there was "ample evidence of both undercapitalization and the stripping of assets." *Id.* at 286.

The Missouri Court of Appeals reached a much different result in a case where the subsidiary was undercapitalized, but where there was no evidence of an improper purpose as to the plaintiff. *C.C. Dillon Co. v. Robinson*, 636 S.W.2d 380 (Mo. App. 1982). The *C.C. Dillon* court held:

> It may be conceded that Chasyl was controlled and 100% owned by Robinson and his wife, but such ownership and control does not of itself authorize piercing the corporate veil. It may also be conceded that Chasyl was minimally financed. Whatever the impact of that fact on other parties, we are unable to see how it establishes an improper purpose *as to this plaintiff.*

Id. at 383 (emphasis added). Therefore, the question is not how much capital Contrux had available, but whether it prepared to meet potential tort claims in a financially responsible manner.

In each case cited by petitioner in which a court sitting in Missouri disregarded the corporate form because of undercapitalization, there was evidence that the parent corporation intended to evade obligations to business creditors. *See H.H. Robertson Co. v. V.S. DiCarlo Gen. Contr., Inc.*, 789 F. Supp. 998 (E.D. Mo. 1992) (shareholders transferred substantially all assets of corporation to related entity thereby rendering first corporation unable to meet financial obligations under subcontract); *Omaha Indemnity Co. v. Royal American Managers, Inc.*, 755 F. Supp. 1451 (W.D. Mo. 1991) (court found evidence that the parent stripped assets from the subsidiary and undercapitalized it in relation to the magnitude of the subsidiary's undertaking); *Grote Meat Co. v. Goldenberg*, 735 S.W.2d 379 (Mo. App. 1987) (wholesale meat seller recovered from sole shareholder of corporate meat buyer where shareholder transferred money out of corporation's capital account immediately before meat purchase);

Collet, 708 S.W.2d 273 (insolvent subsidiary entered 25-year lease). None of the Missouri cases on which petitioner relies involve an action by a tort claimant to pierce the corporate veil of a subsidiary corporation. Undercapitalization is relevant in the above cases because, in each, the defendant corporation intentionally incurred obligations it knew it could not satisfy. Companies prepare for tort liability with insurance, an asset not available to trade creditors. Regardless of Contrux's capitalization, it is apparent that it was operated with sufficient assets to purchase more liability insurance than required by federal regulations.

Petitioner incorrectly suggests the court of appeals should have adopted an objective test in which undercapitalization, without more, would satisfy the improper purpose element of his cause of action. Petitioner's proffered analysis is inconsistent with Missouri law and, therefore, inconsistent with the concept of federalism. A federal court sitting in diversity must apply the law of the state as declared by the state's highest court, and may not exercise independent judgment as to what the law of the state should be. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

It would be contrary to Missouri law for the Court to adopt an objective test of undercapitalization for purposes of establishing the improper purpose element of the cause of action. The court of appeals has held that to pierce the corporate veil of a subsidiary, the plaintiff must plead and prove that "equity requires that the parent and subsidiary be treated as one." *A.L. Lab., Inc. v. Philips Roxane, Inc.*, 803 F.2d 378, 385 (8th Cir. 1986), *cert. denied*, 481 U.S. 1007 (1987). In that case, the court of appeals applied the same three part test adopted by the *Collet* court. *Id.*

Missouri common law requires something more than mere insolvency to pierce the corporate veil. That "something more" exists when a corporation intentionally incurs obligations that it knows it cannot satisfy. *Collet*,

708 S.W.2d 273. As one court noted, "The prospect of an unsatisfied judgment looms in every veil piercing action. . . . Thus, if an unsatisfied judgment is enough for the 'promote injustice' feature of the test, then *every* plaintiff will pass on that score." (Emphasis in original). *Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519 (7th Cir. 1991). Despite ample opportunity to do so, petitioner failed to present evidence that Contrux or Telecom attempted to avoid their obligations to tort claimants such as him.

2. As A Matter Of Law, Contrux Was Not Operated With An Improper Purpose.

Contrux was not operated with an improper purpose as to petitioner. Petitioner failed to present any evidence that Telecom or Contrux improperly attempted to evade financial responsibility for petitioner's tort claim or tort claims generally. The only evidence regarding Telecom's purpose as to Contrux's responsibility for tort claims is that Contrux exceeded federal financial responsibility regulations that were enacted to provide protection for personal injury tort claimants such as petitioner. Petitioner's Appendix, p. 13A. The only improper purposes petitioner claims are that Contrux was undercapitalized and that Telecom formed Contrux as a non-union carrier.[2] Neither claim is sufficient to show an improper purpose.

Contrux is a motor carrier governed by the Interstate Commerce Code. 49 U.S.C. § 10101. Federal regulations

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[2] In both his initial complaint and his amended complaint, petitioner asserted Telecom's "sole purpose" in creating Contrux was to establish a non-union trucking company to take business from Specter Red Ball, a unionized subsidiary plagued with labor problems. The factual inaccuracy of this allegation aside, the district court ruled that such a purpose is not improper. Petitioner's Appendix, p. 39A. Moreover, this statement is an admission that Contrux was not established for the purpose of evading tort liability.

define the "appropriate level of financial responsibility" for motor carriers such as Contrux. 49 C.F.R. § 387.1; Appendix C. The district court and the court of appeals were required to take judicial notice of the regulations. 44 U.S.C. § 1507; *Northern Heel Corp. v. Compo Industries, Inc.*, 851 F.2d 456, 468 (1st Cir. 1988); *Crimm v. Mo. Pac. R.R. Co.*, 750 F.2d 703, 710 (8th Cir. 1984); Fed. R. Evid. 201.

At the time of the accident, federal financial responsibility regulations required Contrux to purchase between $500,000 and $1,000,000 of liability insurance or to obtain a written decision, order or authorization from the Interstate Commerce Commission authorizing Contrux to self-insure.[3] The regulations did not require Contrux to create large cash reserves if it purchased $500,000 to $1,000,000 of liability insurance. 49 C.F.R. §§ 387.7; 387.9. Contrux did much more to prepare for potential tort claims than required by federal law. Not only did Contrux purchase a $1,000,000 primary liability insurance policy that fully satisfied the financial responsibility regulations, it also purchased a $10,000,000 excess liability policy. Thus, at the time of the accident, Contrux had in effect more than ten times the highest amount of liability insurance required by federal law.

The purpose and scope of the regulations is "to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways." 49 C.F.R. § 387.1; Appendix C. The regulations are promulgated pursuant to 49 U.S.C. § 10101. *See* Appendix D. Among the reasons the regulations were promulgated were "to promote safe, adequate,

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[3] The higher $1,000,000 limit applied only to motor carriers transporting hazardous materials. There was no evidence before the courts regarding the cargo Contrux was carrying at the time of the accident. For purposes of the motion to dismiss, however, the Court may assume the $1 million limited applied. 49 C.F.R. § 387.9; Appendix C.

economical and efficient transportation" and to "allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and travelling public." 49 U.S.C. § 10101(a); Appendix D.

Most trucking companies, particularly small, full truckload ("TL") carriers such as Contrux, do not have sufficient assets to meet the federal financial responsibility guidelines or to prepare for potential tort liability without insurance.[4] The regulations establish not only what is necessary to reasonably protect the public, they establish a national standard for financial responsibility that allows interstate motor carriers to operate without insurmountable barriers to market entry. Congress recognized the need for trucking regulations that would protect the public and allow safe, economical and efficient transportation.

In determining that Contrux properly prepared to meet its potential obligations to tort claimants, the court of appeals considered all of Contrux's undisputed assets, including its $11,000,000 of liability insurance.[5] Contrux's purchase of more than ten times the liability insurance

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[4] TL motor carriers ship goods from a point of origin to a final destination without dropping off or redistributing their loads at regional hubs. Less-than truckload ("LTL") carriers pick up loads and transport them to a regional hub where the loads are redistributed among trucks headed to various final destinations.

[5] Telecom does not claim that liability insurance coverage is an asset in the accounting sense. Nevertheless, liability coverage is the customary method of providing for the satisfaction of negligence claims. When determining whether a company had an improper purpose to evade tort claimants, therefore, it is appropriate to consider the insurance coverage the company obtained. To disregard such coverage under a hypertechnical accounting analysis would be to elevate form over substance.

required by federal law is the only evidence of Telecom's purpose as to petitioner or other tort claimants, and negates any suggestion of an improper purpose. Far from violating any "statutory or other positive legal duty", Contrux substantially exceeded the requirements of federal law. *Collet* at 284.

Petitioner has attempted to obscure the undisputed evidence that Contrux surpassed federal financial responsibility regulations by claiming that Contrux's excess carrier Integrity had "wobbly knees for years before the receivership." *See* Petitioner's Appendix, p. 9A. Petitioner further implies that Contrux knew Integrity was in financial trouble. Petitioner's unsupported allegations are irrelevant for two reasons. First, the court of appeals found "Contrux unquestionably had good basic coverage of $1,000,000 from the Insurance Company of Pennsylvania, an insurer whose solvency is not questioned." Petitioner's Appendix, p. 9A. The $1,000,000 primary policy, by itself, *satisfied or exceeded* the financial responsibility regulations. *See* 48 C.F.R. § 387.9 Thus, the court of appeals' holding that Contrux was financially responsible would stand even if Contrux had not purchased the additional insurance from Integrity. Second, plaintiff bases his allegation that Contrux knew Integrity had long-standing financial problems on the fact that Integrity did not receive a Best's rating in 1985 and 1986. The court of appeals correctly noted, however, that Contrux purchased its insurance in 1983 and renewed it in 1984; the accident occurred in 1984 before the 1985 and 1986 Best's reports were released. Petitioner's Appendix, pp. 9A, 10A.

Contrary to petitioner's representations, the court of appeals did not hold that the purchase of insurance, regardless of source or amount always will demonstrate the lack of an improper purpose. The court of appeals held only that where a federal regulation defines financial responsibility for Contrux with respect to potential

tort liability and where the petitioner has failed to present evidence that Contrux was operated with an improper purpose to evade such claims, it would be inconsistent to attribute a bad motive or insufficient financial responsibility to Telecom when Contrux's financial responsibility exceeded the applicable standard. Unlike the court in *Atlas Construction Co. v. Slater*, 746 P.2d 352 (Wyo. 1987), the court of appeals in this case could rule as a matter of law that Contrux's insurance was sufficient to prove it was not operated with an improper purpose. The court was required to take judicial notice of the amount of insurance required by federal regulations to establish financial responsibility in the trucking industry, and petitioner did not come forward with any evidence of an improper purpose as to tort claimants.

C. Personal Jurisdiction Over Telecom Is Inconsistent With Fundamental Principles Of Due Process.

Petitioner has failed to prove that personal jurisdiction over Telecom is consistent with fundamental principles of due process. The fundamental due process requirements applicable in the context of personal jurisdiction are set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1944). In that case, the Court held that to subject a non-resident defendant to a forum's personal jurisdiction, the non-resident must have certain minimum contacts with the jurisdiction such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Id.* at 316.

Two separate and distinct elements of the minimum contacts standard have evolved from *International Shoe* and its progeny. First, a non-resident's conduct must be such that it "purposefully avails itself of the privilege of conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235 (1958). Second, the defendant's

contacts with the forum state must be such that it should "reasonably anticipate being hailed into court there." *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). This latter element is primarily a reiteration of the basic fairness standard of *International Shoe*.

Petitioner essentially claims that Telecom is subject to jurisdiction in the State of Missouri because Telecom is the sole shareholder of a corporation allegedly established to further the "improper purpose" of forming a non-union trucking company and because the subsidiary allegedly is insolvent.[6] Under the minimum contacts analysis, it is unreasonable to believe that Telecom purposefully availed itself of the privilege of conducting activities in Missouri by forming a separate Texas corporation which had its principal place of business in Illinois and which, independent from Telecom, exceeded federal financial responsibility regulations in order to protect against personal injury claims. Further, Telecom could not reasonably anticipate being haled into court in the State of Missouri because it had no control over the day-to-day operations of Contrux and was not involved in any of the acts that led to the alleged truck accident.[7]

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[6] The district court correctly ruled that there is nothing improper about forming a non-union trucking company. Petitioner's Appendix, p. 39A. In an effort to create an issue where none exists, petitioner grossly mischaracterizes the relationship between Contrux, Telecom and Specter Red Ball. Contrux and Specter Red Ball serviced entirely different market segments. Contrux was a full truck load ("TL") motor carrier. Specter Red Ball, Telecom's other trucking subsidiary was one of the nation's largest less-than-truckload ("LTL") carriers and it did not compete with Contrux.

[7] Although petitioner alleges that Telecom controlled Contrux, he does not allege that control was exercised with respect to the transaction attacked. *Collet*, 708 S.W.2d at 284. Petitioner does not allege Telecom controlled the day-to-day operation of

D. The Court Of Appeals' Dismissal Of Petitioner's Complaint Against Telecom Is Consistent With Public Policy As Established By Missouri Courts.

Petitioner's theory seems to be that the statutory limited liability of corporate shareholders should be cast aside whenever a corporation does not have enough money to pay an obligation. Underlying his theory is the illogical notion that corporate limited liability should be permitted except when it is actually needed. Such a position is legally unsupportable and is inconsistent with public policy.

Corporate shareholders are given limited liability to protect them in precisely those situations when the corporation is unable to pay all of its debts. Corporations are designed to provide a limited risk vehicle to encourage economic growth and investment. The purpose of corporations is to allow shareholders to start a business without risking their entire wealth. The court of appeals stated:

> This is a conscious decision made by the law of every state to encourage business in the corporate form. Obviously, the decision has its costs. Some injuries are going to go unaddressed because of the insolvency of the corporate defendant immediately involved, even when its shareholders have plenty of money.

Petitioner's Appendix, pp. 2A, 3A. To the rule of limited liability, Missouri courts allow few exceptions.

The Court should follow Missouri law and honor substance over form. Petitioner's liability theory asks the Court to elevate form over substance. Petitioner suggests

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Contrux's trucking business or the actions of Contrux's driver, Satterfield.

the district court and court of appeals should have considered only assets that appear on Contrux's balance sheet when analyzing Contrux's financial responsibility for a tort claim. He would have the Court ignore Contrux's compliance with federal financial responsibility regulations, the only evidence regarding Contrux's intentions with respect to tort claimants.

This is not the case to abandon the traditional limited liability of corporate shareholders provided by Missouri law. Petitioner would like the Court to ignore his recovery of nearly $1,000,000 from Contrux's primary liability insurance carrier.[8] Petitioner wants more and contends that, in some manner, Telecom attempted to use Contrux to avoid responsibility for tort claims. His position is inconsistent with the fact of his settlements.

II. THE COURT OF APPEALS PROPERLY GRANTED TELECOM'S MOTION TO DISMISS PETITIONER'S AMENDED COMPLAINT PURSUANT TO RULES 12(b)(2) AND 12(b)(6).

A. The United States Supreme Court Should Not Grant The Petition For Writ Of Certiorari Because Petitioner Did Not Oppose The Burden Of Proof Adopted By The Lower Courts.

The jurisdiction of the United States Supreme Court on a petition for writ of certiorari is discretionary. The Court's jurisdiction should not be exercised to determine issues petitioner failed to raise in the lower courts, or to revisit issues that were resolved in his favor. Petitioner did not argue on appeal or in his petition for rehearing that the district court or the court of appeals applied an

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[8] At oral argument, petitioner admitted receiving compensation for his injuries from Contrux's primary liability carrier and from Flexi-Van as part of a partial settlement.

incorrect evidentiary standard and burden of proof to Telecom's motion to dismiss.

In both the district court and the court of appeals, petitioner argued that he should be required to establish only prima facie evidence of personal jurisdiction to defeat Telecom's Rule 12(b)(2) motion to dismiss. Indeed, petitioner admitted, "the plaintiff must submit sufficient facts on the basis of the complaint, taken as true, and affidavits, testimony or other documents to support a prima facie showing of jurisdictional facts." Brief of Appellant, p. 16. While the court of appeals agreed the prima facie standard was appropriate, it was not required to apply a standard of proof to the motion because petitioner did not present any evidence of an improper purpose with respect to him. Where there is a complete absence of proof, the standard of proof becomes essentially an academic question.

B. Petitioner Failed To Present Any Evidence That Contrux Was Operated With An Improper Purpose As To Petitioner.

Telecom moved to dismiss petitioner's Complaint and Amended Complaint under both Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). On a Rule 12(b)(2) motion, petitioner has the burden of proving his jurisdictional allegations. *Infra* pp. 24-25. Because the jurisdictional and liability issues are related, petitioner must establish prima facie evidence supporting the elements of his liability theory. *Supra* p. 7. The court of appeals granted Telecom's motion because petitioner failed to provide any evidence that Contrux was operated with an improper purpose as to him or other tort claimants.

The district court and the court of appeals determined for purposes of Telecom's motion that petitioner had established prima facie evidence that Telecom controlled Contrux and that Contrux was undercapitalized. Petitioner, however, did not present any evidence of an

improper purpose to avoid responsibility for tort claims. Petitioner's Appendix, p. 13A.

The court of appeals assumed that Contrux began its life with an anemic balance sheet and now is insolvent.[9] Telecom did not present evidence to the contrary because, on a motion to dismiss, factual disputes are resolved in petitioner's favor.[10] Because petitioner did not dispute Telecom's affidavit demonstrating that Contrux carried $11,000,000 of liability insurance and because at oral argument petitioner admitted the insurance existed, the court of appeals accepted that evidence as true.[11] The court of appeals then took judicial notice of federal regulations, 49 C.F.R. §§ 387.7, 387.9, that require interstate trucking companies to carry $500,000 to $1,000,000 in liability insurance coverage to qualify as financially responsible. With respect to Contrux's insurance, the court of appeals stated:

> In the first place, Contrux unquestionably had good basic coverage from the Insurance Company of Pennsylvania, an insurer whose solvency is not questionable. . . . it is beyond dispute that Contrux had insurance, and that it was considered financially responsible under the applicable federal regulations. . . . There is no evidence that Telecom or Contrux knew that

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[9] Petitioner provided the district court with the affidavit of John Meara, an accountant who opined that Contrux was insolvent and undercapitalized. The Meara affidavit did not discuss Contrux's insurance.

[10] For purposes of this motion only, Telecom does not contest the district court's conclusion that petitioner established prima facie evidence of undercapitalization.

[11] Telecom provided the district court with the affidavit of Jack Anderson, Contrux's former president, which described Contrux's $11 million in liability insurance coverage and attached as exhibits the declaration pages for the various insurance policies.

> the [excess liability] insurance company was going to become insolvent, and no reason, indeed, that we can think of why anyone would want to buy insurance from a company that he thought would become insolvent.

Petitioner's Appendix, pp. 9A, 13A.

Despite his thorough discovery efforts, petitioner did not present any evidence of Contrux's ability to address tort claims. The Meara affidavit did not even discuss Contrux's insurance coverage or express an opinion on the purpose or intention with which Contrux was operated as to tort claimants. Instead, it focused on whether Contrux satisfied a technical accounting definition of the term "undercapitalization." It was petitioner's decision during the process of discovery and repleading his case to focus solely on "undercapitalization" as opposed to the purpose with which Contrux was operated as to tort claims.

Evidence of undercapitalization, without more, does not establish an improper purpose. *Supra* pp. 8-12. Petitioner's contention that Contrux was insolvent and controlled by Telecom, without evidence of an improper purpose as to tort claimants, is irrelevant in this case because Contrux was deemed financially responsible for tort claims under federal law. *Supra* pp. 12-16; Petitioner's Appendix, p. 12A.

The only evidence of purpose as to tort claimants is Contrux's insurance. Because Contrux's $11,000,000 in insurance coverage substantially exceeded federal financial responsibility regulations, the court of appeals concluded as a matter of law that Contrux was not operated with an improper purpose to evade tort claims. Petitioner's Appendix, p. 13A. Indeed, Contrux's $1,000,000 primary liability policy with the Insurance Company of Pennsylvania was itself sufficient to meet the upper limit of the federal financial responsibility regulations. See, 49 C.F.R. § 387.9. It would be inconsistent to hold that there

was an attempt to evade tort claims when Contrux was deemed financially responsible in that regard by the federal agency governing the trucking industry.

Petitioner's contention that the court of appeals erred by weighing the credibility and quantity of the parties' evidence under a preponderance of the evidence standard is unsupported by the facts or the court of appeals' opinion. The court of appeals dismissed petitioner's complaint against Telecom only after determining that, "no rational trier of fact could find personal jurisdiction over [Telecom]." Petitioner's Appendix, p. 11a. Regardless of the appropriate burden of proof for a Rule 12(b)(2) motion to dismiss, the court of appeals based its holding on the fact that petitioner failed to present evidence that Contrux was operated in an attempt to avoid responsibility for tort claims. Petitioner's Appendix, p. 13A.

C. The District Court And The Court Of Appeals Adopted The Prima Facie Evidence Standard Urged By Petitioner.

The lower courts correctly adopted the prima facie evidence standard suggested by petitioner when they granted Telecom's motion to dismiss petitioner's complaint for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(2), (6). The court of appeals did not require petitioner to satisfy the more stringent preponderance of the evidence standard, or, in fact, any evidentiary standard. Quantum of proof is truly not an issue because petitioner failed to provide any evidence supporting the improper purpose element of his cause of action. Nevertheless, the court of appeals stated quite clearly that it adopted the prima facie evidence standard and it resolved all factual disputes in petitioner's favor. The court of appeals described its analysis as follows:

> "We look at the facts relevant to the issue of jurisdiction in the light most favorable to Radaszewski, give him the benefit of all reasonable inferences from these facts, and deny the motion to dismiss if the record, viewed in this way, raises any genuine issue of fact material to the issue of jurisdiction."

Petitioner's Appendix, p. 12A.

On a Rule 12(b)(2) motion to dismiss, the Court must evaluate the jurisdictional facts presented by the parties to determine if personal jurisdiction lies. Whether jurisdiction lies is a mixed question of law and fact. *Thompson v. Ecological Science Corp.*, 295 F. Supp. 1307, 1310 (E.D. Ark. 1969), *rev'd on other grounds*, 421 F.2d 467 (8th Cir. 1970). A motion to dismiss for lack of personal jurisdiction is often a test of the plaintiff's actual proof. Once a jurisdictional defense properly has been raised, the plaintiff bears the burden of demonstrating contacts with the forum state sufficient to give the court in personam jurisdiction; he cannot shift that burden to the defendant. *Dakota Industries v. Dakota Sportswear*, 946 F.2d 1384, 1387 (8th Cir. 1991); *Institutional Food Mktg. Assoc. v. Golden State Strawberries, Inc.*, 747 F.2d 448, 452 (8th Cir. 1984); *Block Industries v. D.H.J. Industries, Inc.*, 495 F.2d 256, 259 (8th Cir. 1974) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936)); *Timeshare Vacation Club v. Atlantic Resorts, Limited*, 735 F.2d 61 (3rd Cir. 1984); *Hanline v. Sinclair Global Brokerage Corp.*, 652 F. Supp. 1457, 1459 (W.D. Mo. 1987); Fed. R. Civ. P. 12(b)(2). That burden normally is not a heavy one, although the standard of proof varies depending on the procedure used by the court in making its determination. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1351 (1990).

The district court may consider affidavits, pleadings and other evidence or it may hold a full evidentiary

hearing when it considers a Rule 12(b)(2) motion to dismiss. *Welsh v. Gibbs*, 631 F.2d 436 (6th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Publications Group, Inc. v. Am. Soc. of Heating, Refrig. and Air Conditioning Engineers, Inc.*, 566 F. Supp. 316, 318 (D. Conn. 1983). In this case, the district court considered only written materials submitted by the parties. The parties agree that because the district court relied solely on written materials, petitioner was required to establish personal jurisdiction by prima facie evidence. *See Watlow Elec. Mfg. v. Patch Rubber Co.*, 838 F.2d 999, 1000 (8th Cir. 1988); *Welsh*, 631 F.2d 436.

Under the prima facie evidence standard, the court is required to view the facts in the light most favorable to the non-moving party and resolve all factual conflicts in that party's favor. *Dakota Industries*, 946 F.2d at 1387 (citing *Nieman v. Rudolf Wolff & Co., Ltd.*, 619 F.2d 1189, 1190 (7th Cir. 1980), *cert. denied*, 449 U.S. 920 (1980)). On a motion to dismiss for lack of personal jurisdiction, the district court is required to determine if the undisputed facts and the facts resolved in the plaintiff's favor are sufficient to prove jurisdiction. *Dakota Industries*, 946 F.2d at 1387; *Watlow Elec. Mfg.*, 838 F.2d at 1000; *Welsh*, 631 F.2d 436. If not, the district court may dismiss the complaint for lack of personal jurisdiction. Implicit in the rule that factual disputes must be resolved in favor of the non-moving party is the principle that the district court can and must consider undisputed and admitted facts as part of its analysis. *See Welsh*, 631 F.2d 436; *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977). To ignore undisputed facts would be an affront to the principle of judicial economy. The prima facie standard is an evidentiary standard, not a mere examination of the pleadings. *Ring v. First Interstate Mortg., Inc.*, 984 F.2d 924, 926 (8th Cir. 1993).

D. The Eighth Circuit Is Not In Conflict With Other Circuit Courts Regarding The Appropriate Standard To Apply On Rule 12(b)(2) And Rule 12(b)(6) Motions To Dismiss.

There is no conflict between the Eighth Circuit and the circuit courts referred to by petitioner regarding the standard to be applied on a Rule 12(b)(2) and 12(b)(6) motion to dismiss. The district court and the court of appeals adopted a prima facie evidence standard when they ruled on Telecom's motion. Petitioner's Appendix, pp. 12A, 19A. Nevertheless, the court of appeals was not required to *apply* a burden of proof to the facts because petitioner did not provide any evidence of an improper purpose.

The court of appeals has applied the prima facie evidence standard in other cases relating to personal jurisdiction. *See Dakota Industries v. Dakota Sports Wear*, 946 F.2d 1384 (8th Cir. 1991); *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211 (8th Cir. 1977). As petitioner acknowledges, this same prima facie evidence standard has been adopted in other circuits. *See Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899 (2nd Cir. 1981); *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977); *Bialek v. Racal-Milgo, Inc.*, 545 F. Supp. 25 (S.D.N.Y. 1982).

Contrary to petitioner's unfounded accusation, the court of appeals did not reject the prima facie standard as confusing, but described it as a "somewhat confusing formulation." Petitioner's Appendix, p. 11A. Regardless of the court of appeals' opinion of the prima facie standard, the standard it adopted in its holding is consistent with the prima facie evidence standard applied by other courts. Further, it is clear that petitioner did not present any evidence of improper purpose to which the court could apply a burden of proof. Petitioner's Appendix, pp. 11A-13A.

E. The Court Of Appeals Did Not Improperly Transform Telecom's Motion To Dismiss Into A Summary Judgment Motion.

The court of appeals did not improperly "transform" respondent's Rule 12(b)(2) motion into a Rule 56 summary judgment motion. In cases where the jurisdictional and liability facts are related, a Rule 12(b)(2) and 12(b)(6) motion can be handled in a manner similar, though not identical, to a Rule 56 motion. The prima facie evidence analysis is similar to the first part of the Rule 56 analysis; both require the district court to resolve all factual disputes in favor of the non-moving party. Here, however, there is no evidence the court of appeals applied the evidentiary "prism" of a preponderance of the evidence standard to the facts of this case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Indeed, it was unnecessary for the court of appeals to apply any evidentiary standard because as the court noted, "[petitioner] has made *no showing* of any issue of material fact with respect to the dishonesty or improper conduct element of the *Collet* test." (emphasis added) Petitioner's Appendix, p. 13A.

Petitioner has attempted to create a burden of proof issue where none exists. The court of appeals noted that Contrux has $11,000,000 in liability insurance, that the existence of this insurance was beyond dispute, that at least $1,000,000 in "good basic coverage" was still in force, that federal regulations set the industry standard for financial responsibility for companies such as Contrux, that Contrux exceeded those standards, and that the only "improper purpose" petitioner claimed was that Contrux was undercapitalized. Petitioner's Appendix, pp. 2A-14A. Petitioner did not present any evidence of an

improper purpose for the courts to weigh against the evidence that Contrux purchased substantial insurance to cover the claims of persons such as petitioner.

F. The Court Of Appeals And The District Court Did Not Violate Petitioner's Due Process Rights When They Dismissed His Complaint.

Petitioner's assertion that his due process rights have been violated is without substance. Although the Seventh Amendment entitles claimants to a jury trial in all actions at common law where the amount in controversy exceeds $20.00, claimants do not have the right to bring factually and legally unsupported claims. Petitioner was given an opportunity to present evidence on the narrow issue of the district court's personal jurisdiction over Telecom. Petitioner failed to provide any evidence of the critical improper purpose element of his cause of action and thereby failed to establish a prima facie case of jurisdiction.

G. Petitioner Was Aware Of The Evidentiary Nature Of The Proceedings On Telecom's Motion To Dismiss.

The procedural history of this case demonstrates the falsity of petitioner's claim that he was unaware of the evidentiary nature of the proceedings. After the court of appeals considered the district court's first dismissal of this case, it remanded the case to allow petitioner sixty days of additional discovery to prove the elements of his cause of action. Petitioner's Appendix, p. 33A. The court stated explicitly that to avoid dismissal petitioner would have to develop facts proving the second element of the *Collet* test and proving that Telecom's control of Contrux and improper purpose proximately caused an injury to him. *Id.*

Petitioner took full advantage of the sixty-day discovery period in an effort to obtain facts to support the elements of his purported cause of action. Petitioner took at least eight depositions, obtained numerous affidavits and examined countless documents. Petitioner chose to focus his efforts solely on the financial condition of Contrux. Based on the additional discovery, petitioner filed an amended complaint.

Telecom moved to dismiss petitioner's amended complaint for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(2) and 12(b)(6). Both Telecom and petitioner filed affidavits, deposition excerpts, and other information designed to provide the district court with a factual basis for its ruling. The only evidence petitioner presented that allegedly related to the improper purpose element of his cause of action was evidence that Contrux was undercapitalized in the accounting sense. After evaluating the information provided by the parties, the district court again granted Telecom's motion to dismiss without prejudice. Petitioner's Appendix, pp. 18A-27A.

This time, both parties appealed. Petitioner appealed the district court's order dismissing Telecom for lack of personal jurisdiction. Telecom appealed the portion of the district court's order designating the dismissal without prejudice. Both parties included factual material relevant to the issue of the district court's jurisdiction over Telecom in their joint appendix on appeal.

Not only was petitioner aware of the evidentiary nature of the proceedings, but he relied on a three volume joint appendix filed with his brief and urged the court of appeals to resolve all factual disputes in his favor. The thrust of petitioner's argument appears to be that the court of appeals should not have considered the only evidence that truly relates to Telecom's purpose as to Contrux's responsibility to tort claimants such as petitioner.

CONCLUSION

For the reasons stated herein, Konrad Radaszewski's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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APPENDIX A

506.500. Actions in which outstate service is authorized – jurisdiction of Missouri court applicable, when

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) The contracting to insure any person, property or risk located within this state at the time of contracting;

(6) Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child.

2. Any person, whether or not a citizen or resident of this state, who has lived in lawful marriage within this state, submits himself to the jurisdiction of the courts of this state as to all civil actions for dissolution of marriage

or legal separation and all obligations arising for maintenance of a spouse, support of any child of the marriage, attorney's fees, suit money, or disposition of marital property, if the other party to the lawful marriage continues to live in this state or if a third party has provided support to the spouse or to the children of the marriage and is a resident of this state.

3. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

APPENDIX B

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and –

(1) in regulating those modes –

(A) To recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

(2) in regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system; and (I) promote intermodal transportation; and

(3) in regulating transportation by motor carrier of passengers (A) to cooperate with the States on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objections of this subtitle; (B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this subtitle; and (C) to ensure that Federal reform initiatives enacted by the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory actions.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

APPENDIX C

Subpart A – Motor Carrier of Property

§ 387.1 Purpose and Scope

This subpart prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

§ 387.3 Applicability

(a) This subpart applies to for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce.

(b) This subpart applies to motor carriers operating motor vehicles transporting hazardous materials, hazardous substances, or hazardous wastes in interstate, foreign, or intrastate commerce.

(c) *Exception.* (1) The rules in this part do not apply to a motor vehicle that has a gross vehicle weight rating (GVWR) of less than 10,000 pounds. This exception does not apply if the vehicle is used to transport any quantity of Class A or Class B explosives, any quantity of poison gas, or highway route controlled quantity radioactive

materials, as defined in 49 CRF 173.403, in interstate or foreign commerce.

(2) The rules in this part do not apply to the transportation of nonbulk oil, nonbulk hazardous materials, substances, or wastes in intrastate commerce except highway route controlled quantity radioactive materials, as defined in 49 CFR 173.403.

§ 387.5 Definitions.

As used in this subpart –

Accident includes continuous or repeated exposure to the same conditions resulting in public liability which the insured neither expected nor intended.

Bodily injury means injury to the body, sickness, or disease including death resulting from any of these.

Cancellation of insurance the withdrawal of insurance coverage by either the insurer or the insured.

Endorsement an amendment to an insurance policy.

Environmental restoration restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measure taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

Evidence of security a surety bond or a policy of insurance with the appropriate endorsement attached.

Financial responsibility the financial reserves (e.g., insurance policies or surety bonds) sufficient to satisfy liability amounts set forth in this subpart covering public liability.

For-hire carriage transportation of property by motor vehicle except when –

(1) the property is transported by a person engaged in a business other than transportation; and

(2) The transportation is within the scope of, and furthers a primary business (other than transportation) of, the person.

In bulk the transportation, as cargo, of property, except Class A and B explosives and poison gases, in containment systems with capacities in excess of 3,500 water gallons.

In bulk (Class A and B explosives) – the transportation, as cargo, of any Class A or B explosives(s) in any quantity.

In bulk (poison gas) – the transportation, as cargo, of any poison gas in any quantity.

Insured and principal – the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier.

Insurance premium the monetary sum an insured pays an insurer for acceptance of liability for public liability claims made against the insured.

Motor carrier a common, contract, or private carrier of property by motor vehicle.

Property damage means damage to or loss of use of tangible property.

Public liability for bodily injury or property damage and includes liability for environmental restoration.

§ 387.7 Financial responsibility required.

(a) No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in § 387.9 of this subpart.

(b)(1) Policies of insurance, surety bonds, and endorsements required under this section shall remain in effect continuously until terminated. Cancellation may be effected by the insurer or the insured motor carrier giving 35 days' notice in writing to the other. The 35 days' notice shall commence to run from the date the notice is mailed. Proof of mailing shall be sufficient proof of notice.

(2) *Exception.* Policies of insurance and surety bonds may be obtained for a finite period of time to cover any lapse in continuous compliance.

(3) *Exception.* Mexican motor carriers may meet the minimum financial responsibility requirements of this subpart by obtaining insurance coverage, in the required amounts for periods of 24 hours or longer, from insurers that meet the requirements of § 387.11 of this subpart. A Mexican motor carrier so insured must have available for

inspection in each of its vehicles copies of the following documents:

i) The Certificate of Registration;

ii) The required insurance endorsement (Form MCS-90); and

iii) An insurance identification card, binder, or other document issued by an authorized insurer which specifies both the effective date and the expiration date of the temporary insurance coverage authorized by this exception. Mexican motor carriers insured under this exception are also exempt from the notice of cancellation requirements stated on Form MCS-90.

(c) Policies of insurance and surety bonds required under this section may be replaced by other policies of insurance or surety bonds. The liability of the retiring insurer or surety, as to events after the termination date, shall be considered as having terminated on the effective date of the replacement policy of insurance or surety bond or at the end of the 35 day cancellation period required in paragraph (b) of this Section, whichever is sooner.

(d) Proof of the required financial responsibility shall be maintained at the motor carrier's principal place of business. The proof shall consist of –

(1) "Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability Under Section 29 and 30 of the Motor Carrier Act of 1980" (Form MCS-90) issued by an insurer(s);

(2) A "Motor Carrier Surety Bond for Public Liability Under Section 30 of the Motor Carrier Act of 1980" (Form MCS-82) issued by a surety; or

(3) A written decision, order, or authorization of the Interstate Commerce Commission authorizing the motor carrier to self-insure under § 1043.5 of this title, provided the motor carrier maintains a satisfactory safety rating as determined by the Bureau of Motor Carrier Safety under party 385 of this title.

(e) The proof of minimum levels of financial responsibility required by this section shall be considered public information and be produced for review upon reasonable request by a member of the public.

(f) All vehicles operated within the United States by motor carriers domiciled in a contiguous foreign country, shall have on board the vehicle a legible copy, in English, of the proof of the required financial responsibility (Forms MCS-90 or MCS-82) used by the motor carrier to comply with paragraph (d) of this section.

(g) Any motor vehicle in which there is no evidence of financial responsibility required by paragraph (f) of this section shall be denied entry into the United States.

§ 387.9 Financial responsibility, minimum levels.

The minimum levels of financial responsibility referred to in § 387.7 of this subpart are hereby prescribed as follows:

SCHEDULE OF LIMITS

[Public Liability]

	Commodity transported	July 1, 1981	January 1, 1985
(1) For-hire (in interstate or for foreign commerce)	Property (nonhazardous)	$500.00	$750,000
(2) For-hire and private (in interstate, foreign, or intrastate commerce).	Hazardous substances, as defined in 49 CFR 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or in bulk Class A or B explosives, poison gas (Poison A), liquefied compressed gas or compressed gas; or highway route controlled quantity radioactive materials as defined in 49 CFR 173.403	1,000,000	5,000,000
(3) For-hire and private (in interstate or foreign commerce; in any quantity) or (in intrastate commerce: in bulk only).	Oil listed in 49 CFR 172.101; hazardous waste, hazardous materials and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned din (2) above or (4) below.	500,000	1,000,000
(4) For-hire and private (in interstate of foreign commerce).	Any quantity of class A or B explosive; any quantity of poison gas (Poison A); or highway route controlled quantity radioactive materials as defined in 49 CFR 173.403	1,000,000	5,000,000

[1]The type of carriage listed under numbers (1), (2), and (3) apply to vehicles with a gross vehicle weight rating of 10,000 pounds or more. The type of carriage listed under number (4) applies to all vehicles with a gross vehicle weight rating of less than 10,000 pounds.

APPENDIX D

§ 1507. Filing document as constructive notice; publication in Federal Register as presumption of validity; judicial notice; citation

A document required by section 1505(a) of this title to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title. Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it. The publication in the Federal Register of a document creates a rebuttable presumption –

(1) that it was duly issued, prescribed, or promulgated;

(2) that it was filed with the office of the Federal Register and made available for public inspection at the day and hour stated in the printed notation;

(3) that the copy contained in the Federal Register is a true copy of the original; and

(4) that all requirements of this chapter and the regulations prescribed under it relative to the document have been complied with.

The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number.